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12 CHARMING SHOPPES, INC.

13  
14 UNITED STATES DISTRICT COURT  
15 NORTHERN DISTRICT OF CALIFORNIA  
16

17 SHAMEIKA MOODY, as an individual  
and on behalf of others similarly situated,

18 Plaintiff,

19 vs.

20 CHARMING SHOPPES OF  
21 DELAWARE, INC., a corporation ; LANE  
BRYANT, INC., a corporation;  
22 CHARMING SHOPPES, INC., a  
corporation, and DOES 1 through 20,  
23 inclusive,

24 Defendants.

25 Case No. C 07-06073 MHP

DEFENDANT CHARMING SHOPPES,  
INC.'S NOTICE OF MOTION AND  
MOTION TO DISMISS FOR LACK OF  
PERSONAL JURISDICTION

MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF

Date: May 5, 2008  
Time: 2:00 p.m.  
Place: Courtroom 15, 18th Floor  
Judge: Hon. Marilyn H. Patel

[Fed. R. Civ. Proc. 12(b)(2)]  
[SPECIAL APPEARANCE ONLY]

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**NOTICE OF MOTION AND MOTION TO DISMISS**

PLEASE TAKE NOTICE THAT on May 5, 2008 at 2:00 p.m., or as soon thereafter as the matter may be heard in Courtroom No. 15 of the above-entitled Court, located at 450 Golden Gate Ave., San Francisco, CA 94102, Defendant Charming Shoppes, Inc. will and does hereby move this Court for an Order dismissing it from this action for lack of personal jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(2). Plaintiff cannot establish that the Court may exercise either general or specific personal jurisdiction over Defendant Charming Shoppes, Inc.

This Motion is based on this Notice of Motion and Motion; the Memorandum of Points and Authorities filed concurrently; the Declarations of John J. Sullivan and Elizabeth A. Ackley filed concurrently; the record for this action; and such other oral and documentary evidence and legal memoranda that may be presented at or by the hearing on this Motion.

Dated: March 31, 2008

MORGAN, LEWIS & BOCKIUS LLP

By                            /S/  
Eric Meckley  
Specially Appearing for Defendant  
CHARMING SHOPPES, INC.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Shameika Moody (“Plaintiff”) was employed by Defendant Lane Bryant, Inc. (“Lane Bryant”). Lane Bryant has not challenged the Court’s exercise of personal jurisdiction and has answered the Complaint.

Plaintiff has also sued Lane Bryant’s parent corporation, Charming Shoppes, Inc. (“CSI”), as well as a different subsidiary corporation of CSI, Charming Shoppes of Delaware, Inc. (“CSDI”). In response to an earlier filed motion to dismiss by CSDI, the Court ruled that specific personal jurisdiction existed as to CSDI based on the fact that CSDI had sent paychecks and wage statements to California residents and paid California payroll taxes on behalf of Lane Bryant. *See* February 27, 2008 Order, Court Docket #37.

The facts upon which the Court based its ruling as to CSDI do not exist with respect to CSI; specifically, CSI has not sent money, paychecks, wage statements, or payroll taxes into the State of California. The analysis which the Court relied on to find personal jurisdiction over CSDI does not apply to CSI, and the Court should consider CSI’s motion to dismiss based upon the facts unique to CSI.

Plaintiff cannot establish that the Court may exercise either general or specific personal jurisdiction over CSI. CSI does not have the “substantial” or “continuous and systematic” contacts with California necessary to establish general personal jurisdiction. CSI is not incorporated in and has no physical presence in California, does not make sales in California, does not solicit or engage in business in California, does not serve the state’s markets, does not have a designated agent for service of process in California, and does not hold a license in California.

CSI’s relationship as a parent corporation of Lane Bryant, Inc. and CSDI is legally insufficient to establish personal jurisdiction. There is simply no credible basis for finding personal jurisdiction as to CSI based upon any alter-ego, joint employer, integrated enterprise, agency or any other theory of imputed jurisdiction.

The requirements for establishing specific personal jurisdiction also cannot be established.

1 CSI has not “purposefully availed” itself of the privileges of doing business in California or  
 2 purposely directed any activities toward California, Plaintiff’s claims do not arise out of or result  
 3 from any alleged forum-related activities of CSI, and exercising jurisdiction of CSI would not be  
 4 reasonable. The exercise of personal jurisdiction over CSI would be unfounded and violate  
 5 federal due process requirements. As a result, this Court should dismiss CSI from this action.

6 **II. FACTUAL BACKGROUND**

7 **A. Plaintiff’s Wage and Hour Claims**

8 Plaintiff brings this action on behalf of a purported class of employees who allegedly  
 9 worked for Defendants Charming Shoppes, Inc., Lane Bryant, Inc., and Charming Shoppes of  
 10 Delaware, Inc. in California from October 11, 2003 through the present. *See* First Amended  
 11 Complaint (“FAC”), ¶ 20. Plaintiff worked as an Assistant Store Manager from around  
 12 November, 2006 through early July, 2007 at a Lane Bryant retail store in California. *See* FAC, ¶  
 13 11.

14 The First Amended Complaint alleges on behalf of Plaintiff and each of the putative class  
 15 members the following wage and hour claims against CSI and the other defendants: (1) failure to  
 16 pay overtime wages in violation of Labor Code Section 1194 and the California Industrial  
 17 Welfare Commission Wage Orders (*See* FAC ¶¶ 33-41); (2) failure to timely pay wages due at  
 18 termination in violation of Labor Code Sections 201 and 202 and recovery of penalties under  
 19 Labor Code Section 203 (*See* FAC ¶¶ 42-46); (3) failure to provide meal periods in violation of  
 20 California Labor Code Sections 226.7 and Section 11 of the California Industrial Welfare  
 21 Commission Wage Order No. 7 (*See* FAC, ¶¶ 47-53); (4) failure to comply with itemized  
 22 employee wage statement provisions in violation of Labor Code Section 226 (*See* FAC ¶¶ 60-63);  
 23 and (5) violation of Business and Professions Code Section 17200, *et seq.* based upon the above  
 24 alleged violations (*See* FAC ¶¶ 64-70).<sup>1</sup>

25 **B. Lane Bryant, Inc.**

26 At all times since at least January 1, 2002, Lane Bryant, Inc. (“Lane Bryant”) has owned

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27 <sup>1</sup> Plaintiff’s fraud claim (fourth cause of action) in the FAC is asserted only against CSDI.  
 28 *See* FAC ¶¶ 54-59.

1 and operated all Lane Bryant stores in California. Declaration of Elizabeth Ackley (“Ackley  
 2 Dec.”), ¶ 3; Declaration of John J. Sullivan (“Sullivan Dec.”), ¶ 10. Lane Bryant is headquartered  
 3 in Columbus, Ohio, and its key operational officers (LuAnn Via, President; Elizabeth A. Ackley,  
 4 Vice President—Lane Bryant Human Resources; and Joseph C. Hash, Vice President of Stores)  
 5 direct and manage the business of Lane Bryant stores in California. Ackley Dec., ¶ 2. These  
 6 officers all work out of Lane Bryant’s Columbus, Ohio headquarters, and none are directors,  
 7 officers, or managers of CSI or CSDI. *Id.* The business operations of Lane Bryant stores are  
 8 directed and managed by the Lane Bryant management team, and not by Lane Bryant’s parent  
 9 corporation CSI. *Id.*, ¶ 3.

10 Lane Bryant has established and enforced the human resources policies and practices that  
 11 apply to Lane Bryant employees, including the policies regarding overtime compensation and  
 12 meal periods. Ackley Dec., ¶¶ 4, 6. Lane Bryant has its own employee handbook and personnel  
 13 policies, which were developed and established by the Lane Bryant management team and  
 14 distributed solely to Lane Bryant employees. *Id.*, ¶ 5.

15 **C. Charming Shoppes, Inc.**

16 CSI is a publicly-traded corporation incorporated and headquartered in Pennsylvania.  
 17 Sullivan Dec., ¶ 2. It is a retail apparel holding company and does business through three distinct  
 18 and separate corporate subsidiaries: Lane Bryant; Catherines, Inc.; and Fashion Bug Retail  
 19 Companies, Inc. *Id.* CSI is the sole shareholder of subsidiaries CSDI and Lane Bryant.<sup>2</sup> Sullivan  
 20 Dec., ¶¶ 3,8.

21 CSI does not engage in any business activities in California. CSI has no office, mailing  
 22 address, telephone listing, hard assets, bank accounts, or registered agents in California. CSI does  
 23 not solicit California residents; manufacture, purchase, or sell goods in California; advertise  
 24 goods or services in California; or pay taxes in California. Sullivan Dec. ¶¶ 6-7.

25 CSI does not exert management control over the operations of its corporate subsidiaries,  
 26 including Lane Bryant and CSDI. CSI exercises only that level control over its subsidiaries that a

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27 <sup>2</sup> CSDI provides certain shared services, including payroll services, to CSI’s operating  
 28 subsidiaries, including Lane Bryant. Sullivan Dec., ¶ 3.

1 sole shareholder is permitted to exercise, through the election of its subsidiaries' boards of  
 2 directors. Sullivan Dec., ¶ 8. CSI does not manage or direct the work of any Lane Bryant  
 3 employees in California. CSI does not pay the wages of any Lane Bryant employees in  
 4 California. CSI is not listed on the wage statements of any Lane Bryant employees in California.  
 5 CSI also does not hire or select Lane Bryant employees in California. Sullivan Dec., ¶ 9. CSI  
 6 does not determine, direct, implement, or enforce the policies or practices of Lane Bryant stores  
 7 related to overtime compensation or meal periods for Lane Bryant employees in California. *Id.*

8 CSI reports the financial results of its corporate subsidiaries on a consolidated basis and  
 9 describes to investors and the public the activities of its operating subsidiaries. Sullivan Dec., ¶ 4.  
 10 Lane Bryant and CSI have one director in common, and CSDI and CSI also have one common  
 11 director. Lane Bryant has 23 officers—eleven of whom are officers of CSI. CSDI has 34 officers—  
 12 fifteen of whom are officers of CSI. Sullivan Dec., ¶ 4.

13 **III. LEGAL ARGUMENT**

14 **A. CSI's Contacts with California Are Insufficient for This Court to Exercise**  
**Personal Jurisdiction Over CSI.**

15 Fundamental precepts of due process require that non-resident defendants have certain  
 16 “minimum contacts” with the forum state to ensure that the exercise of either general or specific  
 17 personal jurisdiction does not “offend traditional notions of fair play and substantial justice.”<sup>3</sup>  
 18 *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). The purpose  
 19 of the “minimum contacts” test articulated in *International Shoe* is twofold: (1) to protect  
 20 defendants against the burdens of litigating in a distant, inconvenient forum; and (2) to ensure that  
 21 states do not step beyond the limits of their sovereignty under a federal system of government.  
 22 *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291, 100 S. Ct. 559, 564 (1980).

23  
 24  
 25 <sup>3</sup> Under California’s long-arm statute, both federal and state courts sitting in California  
 26 “may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of  
 27 the United States.” Cal. Code Civ. Proc. § 410.10; *Hilsenrath v. Equity Trust Limited*, 2008 WL  
 28 728902, at \*2 (N.D. Cal. March 17, 2008) (“California’s jurisdictional statute is co-extensive with  
 federal due process requirements; therefore, jurisdictional inquiries under state law and federal  
 due process standards merge into one analysis.”).

1           The plaintiff bears the burden of proving that a court may exercise personal jurisdiction  
 2 over a defendant. *Schwarzenegger v. Fred Motor Co.*, 374 F.3d 797, 800 (9th Cir. 2004). If the  
 3 jurisdictional challenge is based solely on written papers, plaintiff must make a *prima facie*  
 4 showing of jurisdiction. *Id.*

5           1.        Plaintiff Cannot Establish General Personal Jurisdiction Over CSI

6           A court may exercise general personal jurisdiction only if a defendant is *domiciled* in the  
 7 forum state or its activities there are “*substantial, continuous and systematic*.*”* *Perkins v. Benguet*  
 8 *Consolidated Mining Co.*, 342 U.S. 437, 445, 72 S. Ct. 413, 418 (1952) (emphasis added);  
 9 *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414-19, 104 S. Ct. 1868,  
 10 1872-74 (1984) (finding that defendant did not have the “kind of continuous and systematic  
 11 general business contacts” required to establish general jurisdiction). In addition, even if a  
 12 defendant is found to have engaged in “substantial” or “continuous and systematic” activities in  
 13 the forum state, the exercise of general personal jurisdiction still must be determined to be  
 14 “reasonable” so as to require a defendant to defend itself in the forum state (i.e., that the exercise  
 15 of jurisdiction “comports with fair play and substantial justice”). *Amoco Egypt Oil Co. v. Leonis*  
 16 *Navigation Co., Inc.*, 1 F.3d 848, 851, fn. 2 (9th Cir. 1993) (citing *Burger King Corp. v.*  
 17 *Rudzewicz*, 471 U.S. 462, 477-78, 105 S. Ct. 2174, 2184-85 (1985)). The amount of contact with  
 18 the forum state necessary to establish general personal jurisdiction is “intended to be a fairly high  
 19 standard” (*Brand v. Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir. 1986)) and “requires that the  
 20 defendant’s contacts be of the sort that approximate physical presence.” *Bancroft & Masters, Inc.*  
 21 *v. Augusta National, Inc.*, 223 F.3d 1082, 1086 (9<sup>th</sup> Cir. 2000).

22           There is no basis for the Court to exercise general personal jurisdiction over CSI. CSI has  
 23 no operations or employees in California and conducts *no activities* in California, let alone the  
 24 type of “substantial” or “continuous and systematic” activities necessary to establish general  
 25 personal jurisdiction. *See Sullivan Dec.*, ¶¶ 6-7. Factors weighing heavily in deciding whether  
 26 general jurisdiction exists include whether a defendant: 1) is incorporated in the state; 2) makes  
 27 sales in the state; 3) solicits or engages in business in the state; 4) serves the state’s markets; 5)  
 28 designates an agent for service of process in the state; or 6) holds a license in the state. *Bancroft*

1 & Masters, Inc., 223 F.3d at 1086. Here, none of the above factors apply to CSI. CSI is neither  
2 incorporated nor headquartered in California, but rather is incorporated and has its principal place  
3 of business and operations in Pennsylvania. Sullivan Dec., ¶ 2. CSI does not engage in any  
4 business activities in California and has no office, mailing address, telephone listing, hard assets,  
5 bank accounts, or registered agents in California. *Id.* at ¶¶ 6-7. CSI does not exert any  
6 management control over the California operations or employees of its corporate subsidiaries,  
7 including Lane Bryant. *Id.* at ¶¶ 8-9. The total lack of any contact with California precludes any  
8 finding that CSI's activities "approximate physical presence" in California. *Bancroft & Masters,*  
9 *Inc.*, 223 F.3d at 1086.

a. **Personal Jurisdiction Over Lane Bryant and/or CSDI Cannot Be Imputed to the Parent Corporation CSI**

12 Plaintiff asserts that this Court “has jurisdiction over [Defendant] as it is the parent owner  
13 of the wholly-owned subsidiary, Lane Bryant, Inc. and Charming Shoppes of Delaware, Inc.,  
14 [and] that the acts and contacts of Lane Bryant, Inc. and Charming Shoppes of Delaware, Inc. can  
15 be imputed to [Defendant].” FAC, ¶ 9. However, the mere existence of a relationship between a  
16 parent corporation and its separate corporate subsidiary is not sufficient to establish personal  
17 jurisdiction over the parent on the basis of the subsidiary’s contacts with the forum. *Doe v.*  
18 *Unocal Corp.*, 248 F.3d 915, 925 (9th Cir. 2001). In order to premise jurisdiction on a  
19 subsidiary’s contacts, a plaintiff must provide admissible evidence sufficient to make a *prima*  
20 *facie* showing that the subsidiary was the “alter ego” or agent of the parent. *See, e.g., AT&T v.*  
21 *Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996); *Transure, Inc. v. Marsh &*  
22 *McLennan, Inc.*, 766 F.2d 1297, 1299-1300 (9th Cir. 1985). An alter ego or agency relationship  
23 is typified by parental control of the subsidiary’s internal affairs or daily operations. *Doe v.*  
24 *Unocal*, 248 F.3d at 926. Here, Plaintiff cannot establish an alter ego or agency theory of  
25 personal jurisdiction.

(1) Plaintiff Cannot Prove Alter-Ego

To establish an alter ego relationship between CSI and Lane Bryant (or CSDI), Plaintiff must demonstrate that (1) there is such unity of interest and ownership between the corporations

1 that their separate personalities no longer exist, *and* (2) recognizing their separate corporate  
 2 identities would result in fraud or injustice. *AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d at  
 3 591. Application of the alter ego doctrine is appropriate only when corporate formation has been  
 4 used with the intent “to perpetrate a fraud, circumvent a statute, or accomplish some other  
 5 wrongful or inequitable purpose.” *Universal Paragon Corp. v. Ingersoll-Rand Co.*, 2007  
 6 WL518828, at \*5 (N.D. Cal. 2007), *citing Sonora Diamond Corp. v. Sup. Ct.*, 83 Cal. App. 4th  
 7 523, 538 (2000).

8 There is no evidence of a “unity of interest” between CSI and Lane Bryant or CSDI.  
 9 “There is a presumption of corporate separateness that must be overcome by clear evidence that  
 10 the parent in fact controls the activities of the subsidiary.” *Cavert v. Hickins*, 875 F. Supp. 674,  
 11 679 (E.D. Cal. 1995). Here, there is not even an allegation (let alone evidence) that CSI in any  
 12 way “controls” the activities of Lane Bryant or CSDI such that either is a “mere instrumentality”  
 13 of CSI. *Calvert*, 875 F.Supp. at 678. Plaintiff presents no alleged facts demonstrating a singular  
 14 corporate identity, such as “inadequate capitalization, commingling of assets, [or] disregard of  
 15 corporate formalities.” *Katzir’s Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149  
 16 (9th Cir. 2004).

17 Rather, CSI, Lane Bryant, and CSDI have maintained separate corporate identities and  
 18 operate independently of one another. Sullivan Dec., ¶¶ 2-5, 8; Ackley Decl., ¶¶ 2-3. All Lane  
 19 Bryant stores in California are owned and operated by Lane Bryant, not CSI. Ackely Decl., ¶ 3.  
 20 The key operational managers for Lane Bryant, who oversee Lane Bryant’s California stores, are  
 21 not directors, officers, or managers of CSI. *Id.* at ¶ 2. CSI does not exert management control  
 22 over Lane Bryant or CSDI’s day-to-day operations and does not determine, direct, or enforce  
 23 their business or human resources policies or practices, including those at Lane Bryant stores in  
 24 California. Sullivan Dec., ¶¶ 8-9.

25 Moreover, CSI’s mere ownership of Lane Bryant and CSDI does not make them alter egos  
 26 of CSI. *See Harris Rutsky & Co. v. Bell & Clements Limited*, 328 F.3d 1122, 1135 (9th Cir.  
 27 2003). CSI’s reporting on its subsidiaries’ financial results also does not establish the existence  
 28 of an alter ego relationship. *See Doe v. Unocal*, 248 F.3d at 928 (stating that “references in the

1 parent's annual report to subsidiaries or chains of subsidiaries as divisions of the parent company  
 2 do not establish the existence of an alter ego relationship"). Nor does CSI's reporting of the  
 3 financial results of Lane Bryant and its other subsidiaries on a consolidated basis render Lane  
 4 Bryant the alter ego of CSI. *See, e.g., Freudensprung v. Offshore Technical Services, Inc.*, 379  
 5 F.3d 327, 346-47 (5th Cir. 2004) (ruling that SEC filings concerning related corporate entities are  
 6 insufficient to overcome the presumption of corporate separateness and to support the exercise of  
 7 personal jurisdiction over a nonresident company); *Epps v. Stewart Information Services Corp.*,  
 8 327 F.3d 642, 650 (8th Cir. 2003) (finding that nonresident parent's inclusion of subsidiary's  
 9 assets and liabilities in its SEC filings does not establish an alter ego relationship and merely  
 10 supports the existence of a parent-subsidiary relationship). The fact that CSI shares a director  
 11 with both Lane Bryant and CSDI and has some common corporate officers does not evidence  
 12 alter ego status. *Doe v. Unocal Corp.*, 248 F.3d at 925-926 (noting that it is entirely appropriate  
 13 for directors of a parent corporation to serve as directors of its subsidiaries and that common  
 14 directors and officers can and do "change hats" to represent parent and subsidiary separately  
 15 despite common ownership), *citing U.S. v. Bestfoods*, 524 U.S. 51, 69, 118 S.Ct. 1876 (1998)  
 16 (assessing corporate separateness between parent and subsidiary for purposes of establishing  
 17 liability).

18 Courts have also held that a subsidiary corporation's use of an employee handbook  
 19 created by, issued by, or simply mentioning a parent corporation is insufficient to establish  
 20 personal jurisdiction. *See Arce v. Aramark Corp.*, 239 F.Supp.2d 153, 172 (D. Puerto Rico 2003)  
 21 (finding that subsidiary's use of an *employee handbook* with the name of the foreign parent  
 22 corporation was insufficient to warrant the exercise of personal jurisdiction over the parent);  
 23 *Portera v. Winn Dixie of Montgomery, Inc.*, 996 F.Supp. 1418, 1424 (M.D.Ala. 1998) (ruling that  
 24 out-of-state parent corporation's creation of "*general personnel guidelines*" implemented by the  
 25 subsidiary was insufficient to establish personal jurisdiction over the parent); *Hvide Marine Int'l,  
 26 Inc. v. Employers Ins. of WAUSAU*, 724 F.Supp. 180, 187 (S.D.N.Y. 1989) (emphasis added)  
 27 (finding that subsidiary's distribution to employees of an *employee handbook* containing  
 28 "descriptions of employee matters commonly established and administered by all the subsidiary

1 corporations" of the parent did not pierce the corporate veil and establish personal jurisdiction  
 2 over the parent); *cf. Sibley v. Rail America, Inc.*, 2006 WL 83460, at \*3 (W.D.Va. 2006) (holding  
 3 that plaintiff was not employee of parent company under the Federal Employer's Liability Act  
 4 because the parent's mere provision of resources to its subsidiary, including an *employee*  
 5 *handbook*, did not create an employment relationship).

6 CSI did not control either Lane Bryant or CSDI's operations such that these subsidiary  
 7 corporations became CSI's alter egos. *Cf., Kramer Motors, Inc. v. British Leyland, Ltd.*, 628 F.2d  
 8 1175, 1177 (9th Cir. 1980) (finding *no* alter ego relationship where parent company guaranteed  
 9 loans for the subsidiary, reviewed and approved major decisions, placed several of its directors on  
 10 the subsidiary's board, and was closely involved in the subsidiary's pricing decisions).

11 Not only is Plaintiff unable to establish the "unity of interest" between CSI and Lane  
 12 Bryant or CSDI necessary to satisfy the first element of the alter ego theory, Plaintiff is also  
 13 unable to show that recognition of the separate identities of CSI, Lane Bryant, and CSDI would  
 14 result in fraud or injustice. Specifically, for a court to pierce the corporate veil, it must determine  
 15 that there is bad faith conduct on the part of the parent corporation that would otherwise remain  
 16 without remedy. *E.g., Nordberg v. Trilegiant Corp.*, 445 F.Supp.2d 1082, 1102 (N.D. Cal. 2006)  
 17 (J. Patel). Here, Plaintiff cannot identify any actual inequitable result that might result from  
 18 recognizing CSI's corporate separateness. Indeed, Plaintiff has named Lane Bryant as a  
 19 defendant in this action and can readily proceed with the class action against her true employer—  
 20 Lane Bryant. Lane Bryant is an ongoing business; there is no evidence that it is undercapitalized  
 21 or would be unable to satisfy any judgment that might be entered against it. Recognition of CSI's  
 22 separate corporate status certainly does not result in any inequity or potential detriment to  
 23 Plaintiff or the putative class.

24 (2) Plaintiff Cannot Prove Agency

25 To establish an agency relationship, Plaintiff must show that CSI's supposed control over  
 26 Lane Bryant or CSDI was "so pervasive and continual" that either may be considered nothing  
 27 more than an "instrumentality" of CSI. *Sonora Diamond*, 83 Cal. App. 4th at 541. Control is the  
 28 key characteristic of agency, and Plaintiff must show that CSI has "taken over performance of the

1 subsidiary's day-to-day operations." *Id.* As discussed, Plaintiff cannot present any facts  
 2 demonstrating such control by CSI over Lane Bryant or CSDI. Here, there is simply no evidence  
 3 of such a relationship between CSI and Lane Bryant or CSDI. Jurisdiction over CSI may not be  
 4 imputed based upon any agency theory.

5 Plaintiff's FAC makes the conclusory allegation that CSI is the "agent, employee, alter ego  
 6 and/or joint venturer of" Lane Bryant and CSDI. FAC ¶ 17. However, as the Court noted in its  
 7 Order on CSDI's motion to dismiss, Plaintiff's "kitchen-sink approach" of alleging joint  
 8 employer, agency, alter-ego, integrated enterprise, and co-conspirator theories of jurisdiction is  
 9 entirely without merit – both factually and legally. *See* February 27, 2008 Order, Court Docket #  
 10 37, pg. 6.

11                   **2. Plaintiff Cannot Establish Specific Personal Jurisdiction Over CSI**

12                  CSI lacks the constitutionally-mandated "minimum contacts" with California required for  
 13 the exercise of personal jurisdiction. Moreover, even if such contacts did exist (which they do  
 14 not), the claims at issue do not arise out of any supposed activities by CSI in California.

15                  The Ninth Circuit has established a three-part test to determine if the exercise of specific  
 16 personal jurisdiction would comport with due process: "(1) the defendant must perform an act or  
 17 consummate a transaction within the forum, purposefully availing himself of the privilege of  
 18 conducting activities in the forum and invoking the benefits and protections of its laws; (2) the  
 19 claim must arise out of or result from the defendant's forum-related activities; [and] (3) exercise  
 20 of jurisdiction must be reasonable." *Rano v. Sipa Press, Inc.*, 987 F.2d 580, 588 (9th Cir. 1993);  
 21 *see, e.g., Bancroft & Masters, Inc.*, 223 F.3d at 1086 (9th Cir. 2000). Here, Plaintiff cannot  
 22 establish any of the requirements for specific jurisdiction.

23                  The first prong of this test requires that Defendant either purposefully avail itself of the  
 24 privileges of conducting activities in the forum state or purposefully direct its activities toward  
 25 the forum state. *Schwarzenegger v. Fred Motor Co.*, 374 F.3d 797, 802 (9th Cir. 2004).  
 26 Typically, evidence of purposeful availment will include "action taking place in the forum that  
 27 invokes the benefits and protections of the laws in the forum," while evidence of purposeful  
 28 direction will include "action taking place outside the forum that is directed at the forum."

1      *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006).

2                Here, CSI is a foreign holding company that does not directly conduct any business in  
 3 California - let alone "purposefully avail" itself of the privileges of doing business in California.  
 4 Sullivan Dec., ¶¶ 2, 6-7. CSI also has not purposefully directed activities into California because  
 5 CSI has not (1) committed an intentional act, (2) expressly aimed at the forum state, which (3)  
 6 causes harm that CSI knew was likely to be suffered in the forum state. *Yahoo! Inc. v. La Ligue*  
 7 *Contre Le Racisme et L'Antisemitisme*, 433 F.3d 1199, 1206 (9th Cir. 2006) (*citing*  
 8 *Schwarzenegger*, 374 F.3d at 803). As discussed *supra*, this Court previously ruled that CSDI did  
 9 commit "intentional acts" aimed at California by sending wage statements, paychecks, and related  
 10 payroll taxes into the state when acting as a paymaster on behalf of Lane Bryant. *See* February  
 11 27, 2008 Order, Court Docket # 37, pg. 9. In contrast, however, *CSI has not performed any such*  
 12 *"intentional acts"* and has not affirmatively engaged in *any* activities directed at California. In  
 13 contrast to the Court's findings with respect to CSDI, CSI has not sent paychecks, wage  
 14 statements or payroll taxes into California. Sullivan Dec., ¶¶ 7,9.

15                Even if the first element to establish specific jurisdiction could be established (which it  
 16 cannot), there is no nexus between Plaintiff's wage and hour claims and any supposed activity by  
 17 CSI in California. To establish specific personal jurisdiction, this case must arise out of or result  
 18 from CSI's supposed contacts with California. *See Bancroft*, 223 F.3d at 1088. Plaintiff on  
 19 behalf of a purported class of "non-exempt employees" alleges that her employer Lane Bryant  
 20 failed to properly calculate her overtime wages, failed to provide her with meal periods in  
 21 accordance with California law, failed to pay all final wages upon termination, and failed to  
 22 maintain accurate payroll records. *See* FAC, ¶¶ 33-53, 60-63.

23                As is evident from the allegations of FAC, Plaintiff's claims do not arise out of or result  
 24 from any conduct of CSI. Rather, her claims arise out of and result from the alleged manner in  
 25 which certain of Lane Bryant's Human Resources policies and practices were established,  
 26 implemented, and enforced at Lane Bryant retail stores in California. Lane Bryant establishes,  
 27 implements, and enforces the Human Resources policies and practices applicable to Lane Bryant  
 28 employees. Ackley Dec., ¶¶ 4-6. Lane Bryant has its own employee handbook and personnel

1 policies, developed by the Lane Bryant management team. *Id.*, ¶ 5. CSI does not own, operate,  
 2 control, or manage the Lane Bryant stores in California and has not established, implemented, or  
 3 enforced the Human Resources policies as to Lane Bryant's California employees. Sullivan Dec.,  
 4 ¶¶ 8-10. The First Amended Complaint does not identify any specific person(s) employed by CSI  
 5 who took, or failed to take, some action which resulted in the claims at issue. Indeed, CSI does  
 6 not even have employees in California. Sullivan Dec., ¶ 7. Nor does Plaintiff's claim for  
 7 violation of Labor Code Section 226 arise out of any activities by CSI – because CSI was not  
 8 Plaintiff's employer, did not prepare or transmit any wage statements, and is not listed on any  
 9 wage statements. Sullivan Dec., ¶¶ 7,9. Plaintiff's claims in this action simply do not arise out of  
 10 any California activities on the part of CSI. *See, e.g., Omeluk v. Langston Slip & Batbyggeri A/S,*  
 11 52 F.3d 267, 272 (9<sup>th</sup> Cir. 1995) (injury to plaintiff would have occurred without regard to  
 12 defendant's contacts with forum state). Consequently, Plaintiff cannot meet her *prima facie*  
 13 burden of establishing specific personal jurisdiction.

14 **IV. CONCLUSION**

15 CSI lacks the "substantial" or "systematic and continuous" contacts required for this Court  
 16 to exercise general personal jurisdiction over CSI. Further, there is no evidence that either  
 17 defendant Lane Bryant or CSDI is the alter ego or agent of CSI such that personal jurisdiction  
 18 over these other defendants may be imputed to CSI. Finally, this Court cannot exercise specific  
 19 personal jurisdiction over CSI because Plaintiff's claims in no way arise out of or result from any  
 20 activities in California by CSI. For these reasons, this Court lacks jurisdiction over Defendant  
 21 and therefore must dismiss CSI from this action.

22 Dated: March 31, 2008

MORGAN, LEWIS & BOCKIUS LLP

23  
24 By \_\_\_\_\_ /S/  
25

26 Eric Meckley  
27 Specially Appearing for Defendant  
28 CHARMING SHOPPES, INC.